IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6078

LINDA R. S., *et al.*,

*Appellants,*

v.

RICHARD D. and TEXAS, *et al.*,

*Appellees.*

APPEAL FROM A THREE JUDGE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS

## APPELLANTS' BRIEF

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## APPELLANTS' BRIEF

## OPINION BELOW

The Opinion of the Three Judge District Court for the Northern District of Texas, holding that Appellants attack on Article 602 of the Texas Penal Code was properly before the Three Judge Court, but that Appel-

lants had no standing to challenge, and remanding the challenge of Article 4.02 of the Texas Family Code back to a single District Judge, is reported at 335 F. Supp. 804 (N.Tex., 1971). The District Court's dismissal of Appellants' challenge of Article 4.02 of the Texas Family Code has not been reported.

## JURISDICTION

This suit is brought under 28 U.S.C. Sec. 2281, providing for a direct appeal to the Supreme Court of the United States from the decision of a Three Judge United States District Court granting or denying an interlocutory or permanent injunction in a civil suit required to be heard by a Three Judge Court. The Judgment of the Three Judge Court was entered on November 1, 1971, Notice of Appeal was filed in that Court on November 30, 1971, and this Court noted probable jurisdiction on April 17, 1972. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the Judgment on direct appeal in this case: *Anderson v. Martin*, 375 U.S. 399 (1964); *U.S. v. Georgia Public Service Commission*, 371 U.S. 285 (1963); *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960) and *Radio Corp. of America v. U.S.* 95 F. Supp. 660, affirmed 341 U.S. 412 (1951).

## QUESTIONS PRESENTED

1. Whether Linda R.S., her minor child, and the class they represent are being injured as a result of the unconstitutional application of Article 602, Texas Penal Code, by the District Attorney and thus have standing

because their economic and social damages are within the zone of interest protected by that statute.

2. Whether Texas' unreasonable discriminatory exclusion of the illegitimate child from rights of support from her father violates her United States Constitutional guarantee of equal protection of the laws.

3. Whether Texas' refusal to permit an illegitimate child to complain against her father for failure to provide support denies her due process of law under the Fourteenth Amendment to the United States Constitution.

4. Whether the illegitimate's right of support from her natural father is a fundamental right and liberty, the unreasonable deprivation of which violates the protections of the Ninth Amendment of the United States Constitution.

5. Whether Texas' discrimination against an illegitimate child in support matters operates to deny that child's mother her fundamental rights under the provisions of the Ninth Amendment of the United States Constitution.

6. Whether Texas' denial to the illegitimate child a right of support from her father constitutes a violation of the mother's due process and equal protection guarantees of the Fourteenth Amendment of the United States Constitution.

7. Whether the State of Texas acting through the Dallas County District Attorney, Henry Wade, should be enjoined from continuing to exclude children of unwed parents from the scope of those protected by the provisions of Article 602 of the Texas Penal Code.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ninth Amendment, United States Constitution.

Fourteenth Amendment, United States Constitution.

Article 602 of the Texas Penal Code, Vernon's Annotated Texas Statutes;

"Any husband who shall willfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, *or any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor*, and upon conviction, shall be punished by confinement in the County Jail for not more than two years." (emphasis added)

Article 4.02 of the Texas Family Code, Vernon's Annotated Texas Statutes;

*"Each spouse has the duty to support his or her minor children.* The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed." (emphasis added)

## STATEMENT

On October 3, 1970, Appellant, Linda R. S., gave birth to a baby girl. The baby's mother was not and has never been married to the child's father, Richard D., but she did cohabit with him for a period of several months in

1969 and 1970 during which time she became pregnant by him. Richard D., who was a named Defendant in the lower Court, refused to marry the Appellant or to support his child. (App. 13-14)

On December 3, 1970, Appellant initiated a class action in the United States District Court for The Northern District of Texas, requesting a Three Judge Court be convened to hear her case. Appellant's class action complained of invidious discrimination by the State of Texas, against her child, herself and other unwed mothers and children similarly situated, as a result of the state's refusal to permit an illegitimate child to seek support from its father while the state at the same time afforded such privilege to children of wed parents. (App. 4)

On May 24, 1971, the Appellant confirmed that the Dallas District Attorney would not entertain, on behalf of her child, her complaint against Richard D., for his failure to provide support for his child as required under Article 602 of the Texas Penal Code. (App. 54) Appellant also complained to the Three Judge Court of the unconstitutional exclusion of children of unwed mothers from support benefits afforded under Article 4.02 of the Texas Family Code. (App. 51) This civil provision bestows a right of support to minor children of each "spouse," but is silent as to any such comparable right to children of unwed parents.

Appellant, on behalf of her minor child, individually and on behalf of all Texas mothers and children similarly situated, asked the Three Judge Court to issue a mandatory injunction against Dallas District Attorney, Henry Wade, and the State of Texas to cease their wrongful *EXCLUSION* of illegitimates from the benefits

of Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code. (App. 55)

The Three Judge District Court was duly convened, and after receiving written briefs and hearing oral argument issued its Opinion and Order on November 1, 1971. (App. 59)

The Three Judge Court unanimously agreed that the Court was properly convened to hear Appellants' challenge to the constitutionality of Article 602, and agreed that the challenge to Article 4.02 should be remanded to be heard by a single District Judge. (App. 59-60)

On the question of standing, the Three Judges ruled in a 2 to 1 decision that the Appellant had no standing to challenge the constitutionality of Article 602. (App. 60) The Appellant believes the dissenting Judges' Opinion was correct in holding that the Appellant and her minor child were within the "zone of interest to be protected" by Article 602 and that their exclusion creates an "injury in fact, economic or otherwise," such that "a person for whom the statute was designed to protect would have standing to bring a suit to enjoin an alleged violation of that statute." (App. 62)

It is from the majority Opinion of the Three Judge Court that the Appellants appealed directly to the United States Supreme Court. (App. 73)

## SUMMARY OF ARGUMENT

1. **That Texas discriminates between the legitimate and illegitimate child with respect to enforcing child support rights is undisputed.** While a child born in wedlock or subsequently adopted thereto is granted full rights of support and maintenance from its father, the Courts and legislatures of Texas have consistently refused

to recognize a comparable duty upon the illegitimate's father either at common law, or under the civil or penal codes. *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208, 210 (Tex. Sup. Ct., 1966); *Beaver v. State*, 256 S.W. 929 (Tex. Crim. App., 1923).

2. **The magnitude of illegitimacy in Texas, the serious socio-economic consequences, and the nature of the civil rights involved raise a substantial question to which this Court should speak.** There were 19,466 *reported* illegitimate births in Texas in 1969, representing 8.8% of the total live births.[1] The City of Dallas, Texas alone reported 3,428 illegitimate births in 1969 which was 14.2% of all live births in the city that year.[2] Nationally one in seven births are illegitimate and in many urban areas the incidence of illegitimacy has more than doubled in the past ten years.[3]

The abundant evidence of social, economic and psychological trauma resulting from the illegitimate's second class citizenry has been concisely stated;

> "To be fatherless is hard enough, but to be fatherless with the stigma of an illegitimate birth is a psychic catastrophe."[4]

While the state's refusal to enforce child support for the illegitimate is obviously not the only factor in such serious socio-economic consequences, it is the *major*

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[1]Texas Department of Health, Vital Statistics, 1969

[2]Texas, City of Dallas, Department of Vital Statistics, 1969

[3]U.S. Health, Education & Welfare Department, National Center for Health Statistics, April, 1970, and Sauber Rubenstein, *Experiences of the Unwed Mother As Parent*, Community Journal of Greater New York, 1965, p 1

[4]Fodor, "Emotional Trauma Resulting From Illegitimate Birth" 54 Archives of Neurology in Psychiatry, (1945) p. 31

source of economic deprivation and as such perhaps the largest contributor to the bastard-stigma.

3. Linda R. S. and her minor child, and the class they represent, have standing to challenge Texas' unconstitutional application of Article 602 of the Penal Code. The majority Opinion of the Three Judge District Court erred when it failed to consider, even indirectly, the Supreme Court's recent criteria for standing to sue. In this instance the challenged penal statute was enacted for the welfare and protection of minor children, and a criminal penalty attached for breach of that statute. The minor child is the direct and only economic recipient of the enforcement of Article 602 and therefore, being well within the "zone of interest" and purpose of the Article, the Appellants have a constitutional right to have the Article enforced for their benefit just as it is enforced for the benefit of any other child. The deprivation of that benefit creates a serious economic and social injury, which is a direct result of an unconstitutional application of the state statute by the Dallas County District Attorney.

There is "such a personal stake in the outcome of the controversy as to assure . . . concrete adversariness . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Not only do Appellants have a personal stake in the outcome of this controversy, but the question of the constitutionality of the District Attorney's acts supplies the logical nexus; *Flast v. Cohen*, 392 U.S. 83, at 102 (1968), and brings the unwed mother and her minor child well "within the zone of interest to be protected or regulated by the statute." *Data Processing Service Organization v. Camp*, 397 U.S. 150, at 153 (1970) Even an illegitimate has a right to expect a law that is enacted for the benefit of "children" to be enforced for his benefit in the absence of any rational basis for discrimination. He thus has

standing in this case to challenge the unequal protection of the laws to which he is subjected by the Dallas County District Attorney.

4. The Appellants' unequal treatment constitutes invidious discrimination clearly prohibited by the Fourteenth and Ninth Amendments to the United States Constitution. The Supreme Court in *Levy vs. Louisiana*, 391 U.S. 68 (1968), set forth the inequity as well as the illegality of a state's unreasonable discrimination against an illegitimate child. In *Levy*, the United States Supreme Court struck down Louisiana's discrimination against a minor illegitimate finding such treatment to constitute "invidious discrimination when no conduct on the part of the child was relevant to the discrimination practiced against him," at page 72.

The minor illegitimate in the State of Texas, when seeking equal protection of the laws in support matters, is confronted with an insurmountable barrier. He is blocked by the common law, Article 4.02 of the Texas Family Code, the Court's interpretation of Article 602 of the Texas Penal Code, and a legislature consistently unwilling to respond to his plight.

No reasonable and compelling state interest exists to justify the continued discrimination against this minor child, particularly when such unequal protection of the law is balanced against the resulting serious socio-economic detriment to Appellants.

The state enforces a bastard-stigma which not only deprives children of unwed parents their fair economic support, but encourages a socio-economic condition which is extremely detrimental to the emotional well being of such children.

Texas' refusal to permit its illegitimate children to obtain the same monetary benefits it affords legitimate children, in effect, denies children of unwed parents due process of law under the Fourteenth Amendment to the United States Constitution. *Shapiro vs. Thompson*, 394 U.S. 618 (1969)

The state punishes the child of unwed parents, by penalizing him for circumstances he did not voluntarily enter, and from which he cannot voluntarily escape. Such punishment is "cruel and unusual" under the Eighth and Fourteenth Amendments *Robinson vs. California*, 370 U.S. 660 (1962)

The legislature and Courts of the State of Texas shield the unwed father, and punish the child for the parents' "non-social" behavior. *Smith vs. King*, 392 U.S. 309, 336 n5 (1968) What should be recognized as a basic and fundamental right in *every* child, the right to receive the support and maintenance of its father, is blocked, by the State of Texas, and as such, there occurs a denial to both the unwed mother and the minor child, of the guarantees of the Ninth Amendment.

Texas' laws and practices stand as an insurmountable barrier to prevent the unwed mother from receiving any support or maintneance from the natural father of her child. This practice results in a type of economic coercion which can, and presumably in many instances does, compel the unwed mother to seek an abortion, or place her child for adoption, either of which alternative, she might otherwise not choose. Such infringement upon a mother's right to *freely* elect to keep her child not only invades the guarantees of the Ninth Amendment of the United States Constitution but is contrary to the concepts discussed in *Skinner v. Oklahoma*, 316 U.S. 535, at 541 (1942); *Griswold v. Connecticut*, 381 U.S. 479, at

492 (1965) and *Loving v. Virginia*, 388 U.S. 1 (1967).

5. The Court should issue a mandatory injunction to prevent the Dallas County District Attorney from continuing to discriminatorily exclude children of unwed parents from Texas Child Support Laws.

## ARGUMENT

### TEXAS STATUTES AND DECISIONS

In Texas "a father is not under a common law or statutory duty to support his illegitimate," *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 at 210 (Tex. Sup. Ct., 1966); while a legitimate child, that is, one born in wedlock or subsequently adopted thereto, is granted a full umbrella of statutory and common law support provisions both of a penal and civil nature.

> "... any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under 18 years of age, shall be guilty of a misdemeanor, ..." Article 602 of the Texas Penal Code, Vernon's Texas Penal Code, Annotated

The Courts of this State have consistently interpreted the words "child or children" in the above penal provision to mean legitimate children and have thus excluded the illegitimates from the benefit of protection under Article 602 of the Texas Penal Code. *Beaver v. State*, 256, S.W. 929 (Tex. Crim. App., 1923)

As recently as 1969 the Texas legislature has had an opportunity to impose child support duties upon an illegitimate's father but again elected not to do so when it enacted Article 4.02 of the new Texas Family Code

which became effective January 1, 1970. That statutory provision on its face excludes from the children of unwed parents the benefit of support.

> *"Each spouse has the duty to support his or her minor children.* The husband has the duty to support his wife, and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge a duty of support is liable to any person who provides necessities to those to whom support is owed." Article 4.02, Texas Family Code, Vernon's Texas Civil Statutes (emphasis added)

The laws of the State of Texas thus provide both civil and criminal remedies to assist the legitimate child in securing a measure of support from his father; while the Penal Code, the Family Code, and the decisions of the highest Courts of Texas have systematically excluded illegitimate children from the privileges and protections of these laws.

## THE MAGNITUDE OF ILLEGITIMACY AND THE NATURE OF THE CIVIL RIGHTS INVOLVED RAISE A QUESTION OF SUBSTANTIAL PUBLIC CONCERN

Although no one knows for certain how many illegitimate children are born in Texas every year, because social stigma often drives a mother to concealment and subterfuges, it is known that there were 19,466 illegitimate births *reported* in this state in 1969, which figure represents 8.8% of the total live births.[5]

One in seven are born illegitimate in the United States today,[6] resulting in more than 300,000 illegitimate births

[5]Texas Department of Health, Vital Statistics, 1969

[6]U.S. Health, Education & Welfare Department, National Center for Health Statistics, April, 1970

per year nationally on a trend which will result in more than 400,000 illegitimate births per year in this country by 1980.[7] The rates of national illegitimacy have more than tripled since 1940.[8] In the City of Dallas, Texas, 3,428 illegitimate births were reported in 1969, representing 14.2% of all live births in that city in the same year.[9] In many urban areas of this country the incidents of illegitimacy has more than doubled in the past ten years.[10]

In sheer numbers, and without consideration of the socio-economic implications, which are discussed later in this brief, the problem of ascertaining and securing the civil rights of the illegitimate in Texas is of substantial and compelling magnitude. Not only are literally thousands of illegitimates in this state already confronted with the need to have their civil liberties determined in this area, but thousands more are born every year as both the rate and number of illegitimates increase.

There is sufficient and compelling public interest in the subject matter of this case, such that the Court should now address itself to the question of the systematic but clear discrimination enforced by the laws of this state to prevent this illegitimate child and others similarly situated from receiving the support of their fathers.

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[7]F.J. Fentura, "Recent Trends & Differentials in Illegitimacy" *Journal of Marriage & Family* (August, 1969), p. 466

[8]U.S. Department of Commerce, *Statistical Abstract of United States*, 1967, p 51

[9]Texas, City of Dallas, Department of Vital Statistics, 1969

[10]Sauber and Rubenstein, *Experience of the Unwed Mother As Parent*, Community Council of Greater New York, 1965, p. 1

## I.

### Appellants and the Class They Represent Have Standing in This Case Because They Are Being Injured as a Direct Result of the Unconstitutional Application of a Statute Written for Their Protection and Their Economic and Social Damages Are Sufficient to Assure Concrete Adverseness of This Case.

The Minor Appellant and her mother not only have met, but exceed the standing to sue criteria set forth by the United States Supreme Court in recent decisions. Standing is no longer reviewed in the light of some "abstract" procedural rule but rather in the context of the particular facts and questions presented in each case consistent with the Court's historical guidelines. In that respect Linda R. S., an unwed mother, individually and on behalf of other unwed mothers and illegitimate children similarly situated in the State of Texas contend that Article 602 of the Texas Penal Code, as applied, denies them equal protection of the laws and due process of the law and is unconstitutional and invidious discrimination under the Ninth and Fourteenth Amendments to the United States Constitution. Article 602 in its simplest terms provides:

> "... any parent who shall willfully ... refuse to provide for the support ... of his ... children ... shall be guilty of a misdemeanor, ..."[11]

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[11]Article 602, Texas Penal Code, Vernon's Texas Penal Code Annotated:

"Any husband who shall willfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall willfully desert, neglect or refuse to provide for the support

When Richard D. failed to support his child, the child's mother made application to the Dallas District Attorney's Office to prosecute him pursuant to Article 602. The District Attorney's Office refused her application because she was not married to Richard. (App. 54)

While such refusal is consistent with Texas Courts' position that "child or children" does not include illegitimate children, *Beaver v. State*, 256 S.W. 929 (Tex. Crim. App., 1923), such position is nonetheless invidious discrimination and an unconstitutional application of the statute.

The legislature of the State of Texas by enacting Article 602 undisputedly intended to protect children from fathers who desert, neglect or refuse to support them. The legislature's concern for these children was so great that it attached a criminal penalty for a parent's violation of the statute.

Article 602 places a duty of support and maintenance upon "any parent" and makes no distinction as to whether that parent is a father or a mother, or whether the parent is single, married, separated or divorced.

An application of the Supreme Court's standing criteria indicates that both the minor illegitimate child and her unwed mother are within the class of persons having standing to challenge the unconstitutional application by the Dallas County District Attorney of Article 602 of the Texas Penal Code.

While previous to *Baker v. Carr*, 369 U.S. 186, 204 (1962), and *Flast v. Cohen*, 392 U.S. 83 (1968), the test of standing may have been a "recognized legal interest,"

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and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

## I.

### Appellants and the Class They Represent Have Standing in This Case Because They Are Being Injured as a Direct Result of the Unconstitutional Application of a Statute Written for Their Protection and Their Economic and Social Damages Are Sufficient to Assure Concrete Adverseness of This Case.

The Minor Appellant and her mother not only have met, but exceed the standing to sue criteria set forth by the United States Supreme Court in recent decisions. Standing is no longer reviewed in the light of some "abstract" procedural rule but rather in the context of the particular facts and questions presented in each case consistent with the Court's historical guidelines. In that respect Linda R. S., an unwed mother, individually and on behalf of other unwed mothers and illegitimate children similarly situated in the State of Texas contend that Article 602 of the Texas Penal Code, as applied, denies them equal protection of the laws and due process of the law and is unconstitutional and invidious discrimination under the Ninth and Fourteenth Amendments to the United States Constitution. Article 602 in its simplest terms provides:

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and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

the United States Supreme Court has since 1962 outlined in more specific terms the criteria which must be met before a litigant has "standing" to qualify as a case and controversy under Article III of the United States Constitution.

In *Baker v. Carr*, supra, at 204 the Court set out "the gist of the question of standing";

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions?"

The *Baker* Court then proceeded at page 208, to clearly distinguish between voters having standing to challenge a statute and those who had no such standing. Speaking of the Appellants in the *Baker* case the Court said:

> "They are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' *Coleman v. Miller*, 307 U.S., at 438."

and of those without standing,

> "and not merely a claim of 'the right, possessed by every citizen, to require that the government be administered according to law . . .' *Fairchild vs. Hughes*, 258 U.S. 126, 129."

The Supreme Court thus in 1962 held that "voters who alleged facts showing disadvantage to themselves as individuals have standing to sue." *Baker vs. Carr*, supra, at 206.

The following year the Supreme Court held that "school children and their parents who are directly affected by the laws and practices against which their complaints are directed . . ." have an interest sufficient

to give the parties standing to complain. *School District of Abington vs. Schempp*, 374 U.S. 203, at 224, n9 (1963)

In 1968 the United States Supreme Court considered three significant standing cases. These three cases, a competitor case, a taxpayer case and a union member case, all discussed standing issues which the mother and child in this instance clearly meet.

In *Hardin vs. Kentucky Utilities*, 390 U.S. 1, 6 (1968), the Court held that where a litigant, an independent power company, was within the class of persons for whom the statute was designed to protect, they would have standing even though the statute was a limitation upon an activity of another party, in this instance the T.V.A. The Court noted at page 7;

> "Since respondent *is thus in the class which Sec. 15d" (the disputed statute) "is designed to protect* it has standing under familiar judicial principles to bring this suit, . . . and no explicit statutory provision is necessary to confer standing." (emphasis added)

In *Flast vs. Cohen*, 392 U.S. 83 (1968), the Court addressed itself at length to the standing issue in a federal taxpayer's suit, In *Flast vs. Cohen*, Appellant attached the Federal Education Act as unconstitutional because of its aid to religious schools. The Court reviewed the history of the justiciability doctrine and noted at page 97;

> "The many subtle pressures which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours."

While firm and abstract rules on standing are difficult to come by, the Court in *Flast* nonetheless set forth definite standing principles, all of which the Appellants in this case meet or exceed. the POSTURE of the complaining party himself with respect to the issue, as opposed to the issue itself is fundamental. *Flast vs. Cohen*, supra, at 99. In *Flast* the court noted the importance of standing as it relates to the "concrete adverseness' discussed in *Baker vs. Carr*, 369 U.S. 186, 204 (1962), and added;

> "It is for that reason that the emphasis in a standing problem is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' *Baker v. Carr*, supra, at 204, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests,' *Aetna Life Ins. Co. vs. Haworth*, 300 U.S. 227, at 240-21 (1937), page 101."
>
> "... It is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." ... "For example the standing requirements will vary ..." page 102

*The Flast vs. Cohen* Court concluded that even a federal taxpayer making a serious constitutional challenge to a significant federal expenditure has a sufficient economic injury to give him "standing."

Later in 1968, in *Jenkins vs. McKeithen*, 395 U.S. 411 (1969), the Supreme Court found that a labor union member had sufficient standing to challenge an administrative procedure which could potentially raise a criminal complaint against him, even though one apparently was not then filed, and the Court recon-

firmed the *Baker vs. Carr*, supra, and *Flast vs Cohen*, supra, standing concepts that the litigant must have a personal stake so as to assure concrete adverseness and, in addition, that there must be a connection between the "official action challenged, and some legally protected interest of the party challenging that action." *Jenkins vs. McKeithen*, supra, at 423.

The Appellant mother and her child together with the class they represent certainly meet all of the concepts of standing as dicussed by the Supreme Court during the past several years, including the most recent "zone of interest" described in *Data Processing Service Organization vs. Camp*, 397 U.S. 150 (1970). In that competitor's suit the Appellant sought to challenge a regulation issued by the United States Comptroller and directed to federal banks.

In that case an outsider challenged the statutory regulation between a governmental agency and the regulated party, which posture of the parties is not significantly different from that of the parties herein. The Court noted in *Data Processing Service Organization vs. Camp*, supra, at page 153;

> "The legal interest test goes to the merits. The question of standing is different. It concerns, apart from the 'case' and 'controversy' test, the question of whether the interest sought to be protected by the complainant is arguably *within the zone of interest to be protected or regulated by the statute* or constitutional guarantee in question." emphasis added

And the Court continued at page 154;

> "Certainly he who is 'likely to be financially injured, *FCC vs. Sanders Bros. Radio Station*,, 309 U.S. 470,

477, may be a reliable private attorney general to litigate the issues of the public interest in the present case."

Other "outsider" cases have followed the "zone of interest" test discussed in *Data Processing Service Organization vs. Camp*, supra; see *Arnold Tours vs. Camp*, 400 U.S. 45 (1970); *Investment Company Institute vs. Camp*, 401 U.S. 617 (1971); see also *Barlow vs. Collins*, 397 U.S. 159 (1970).

In final analysis, it is a reasonable presumption that if the District Attorney of Dallas County would enforce Article 602 against the parents of illegitimate children, those parents would contribute to the support and maintenance of their children rather than face the possible consequence of jail. Clearly, because the State of Texas through its District Attorney will not enforce the language of this statute against fathers of illegitimate children those children are not receiving economic benefits which they would otherwise receive. In addition, the child's mother, because she alone contributes to the support of the child, and thus, personally meets the requirements of the law that *every parent support* their child, complains of unequal protection when the District Attorney refuses to require the child's natural father to bear a comparable responsibility.

The intent of the statute is clear. It was designed to assure the welfare of children under eighteen years of age. While the state may suffer indirectly by the District Attorney's failure to enforce such statute against all parents equally, the minor child and her mother suffer a direct and significant economic injury.

Certainly the Appellants have a sufficient "stake to assure concrete adverseness" as required by *Baker vs.*

*Carr*, 369 U.S. 186 (1962); there can be no question but that the Appellants are "persons within the class to be protected by the statute," *Hardin vs. Kentucky Utilities Co.*, 395 U.S. 411 (1968); and when the *Flast vs. Cohen*, 392 U.S. 83 (1969), standing test focuses upon the Appellants personally as against the issues, it is apparent that a sufficient legal nexus exists between the Appellants and the Dallas County District Attorney, such that Linda R. S. and her child are not mere bystanders to the action; and finally, the minor child and her mother are without question within the "zone of interest to be protected" as discussed in *Data Processing Service Organization vs. Camp*, supra.

The United States Supreme Court has during the past ten years stated that statutory regulations flowing between a federal bank and the United States Comptroller can be challenged by an outside competitor;[12] that a statute written by the legislature to regulate candidates can be challenged by a voter;[13] that administrative procedures to regulate a union can be challenged by an independent union member,[14] and that a statute providing United States aid to religious schools can be challenged by an independent taxpayer;[15] there should be no question but that a minor child and her mother, whose welfare a statute was designed to protect, and who are the direct and only economic recipients of the enforcement of such statute, certainly have standing to challenge an action of the part of a state agency which

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[12]Data Processing Service Organization vs. Camp, 397 U.S. 150 (1970)
Arnold Tours vs. Camp, 400 U.S. 45 (1970)
Investment Company Institute vs. Camp, 401 U.S. 617 (1971)
[13]Baker vs. Carr, 369 U.S. 186 (1962)
[14]Jenkins vs. McKeithen, 395 U.S. 411 (1969)
[15]Flast vs. Cohen, 392 U.S. 83 (1968)

unconstitutionally denies them the benefits of such law.

## II.

### Texas Discriminatory Exclusion of This Illegitimate from Rights of Support Violates Her U.S. Constitutional Guarantee of Equal Protection of the Laws

No state shall ". . . deny to any person within its jurisdiction the equal protection of the laws." AMENDMENT FOURTEEN, Section I, United States Constitution.

A search of probable sources indicates that it was not until 1968 that a Court in this country for the first time considered in equal protection terms the validity of discrimination against illegitimates. See 65 Mich. Rev. 477 at 483, Equal Protection for the Illegitimate.

A constitutional denial of equal protection of the laws in this case is evident when read in the light of the United States Supreme Court's landmark decision in *Levy vs. Louisiana*, 391 U.S. 68 (1968), wherein Justice William Douglas stated on page 70;

> "We start from the premises that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Fourteenth Amendment."

The particular issue before the Court in *Levy vs. Louisiana*, supra, dealt with the mother-child relationship and specifically with whether an illegitimate could be discriminatorily excluded from the benefits of a state's wrongful death statute. In that decision the Court noted that a state has broad powers when it comes to making classifications but was quick to point out that,

". . . it may not draw a line which constitutes an invidious discrimination against a particular class." Justice Douglas noted the Courts have ". . . been extremely sensitive when it comes to basic civil rights, . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." p. 71

The Supreme Court pointed out the inequity as well as the illegality of discriminating against the illegitimate in noting in *Levy vs. Louisiana*, supra, that:

"He certainly is subject to all the responsibilities of a citizen, including payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy . . ." p. 71

". . . we conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." p. 72

Although the Supreme Court in the above case was dealing with the mother-child relationship, an examination of the theory and specific language supporting that decision compels us to conclude that no different result should obtain in considering the father-child relationship. Indeed the Supreme Court's intent to apply the equal protection clause beyond the mother-child illegitimate relationship was indicated, when in a concurring opinion later in the same year it was observed:

"The other day in a comparable situation *we held that the equal protection clause of the Fourteenth Amendment barred discrimination against illegitimate children.* We held that they cannot be denied a cause of action because they were conceived in 'sin', that the making of such a disqualification was

an invidious discrimination. *Levy v. Louisiana,* 391 U.S. 68." *Smith v. King*, 392 U.S. 309, 336 (1968) emphasis added, J. Douglas concurring opinion.

*Dandridge vs. Williams*, 397 U.S. 471, 523 (1970), a welfare case from the State of Maryland, also indicated the Court intended a broad application of the equal rights protection of illegitimates when J. Marshall noted that the case before the Supreme Court in that instance "... bears some resemblance to the classification between legitimate and illegitimate children which we condemned as a violation of the equal protection clause in *Levy vs. Louisiana*, 391 U.S. 68 (1968)."

A score of law reviews and journals have interpreted the Supreme Court's action in *Levy vs. Louisiana*, supra, to mean "... the equal protection clause will protect a bastard even against distinctions and classifications that have deep roots and can be readily rationalized." 82 Harv. L. Rev. 63, 293-4 (1968), see also 36 U. Chi. L. Rev. 338, 338 (1968) Off-spring of *Levy vs. Louisiana*, Krause.

At least one State Court has considered the father-child relationship and specifically the right of the illegitimate to receive support from his father. The Missouri Supreme Court unanimously concluded in R__ vs. R__, 431 S.W.2d 152, 154 (Mo., 1968);

"... the principles applied by the U.S. Supreme Court would render invalid state action which produces discrimination between legitimate and illegitimate children insofar as the right to compel support by his father is concerned ...

"The decisions of the U.S. Supreme Court compel the conclusion that the proper construction of our statutory provisions relating to the obligations and

rights of the parents . . . affords illegitimate children a right equal to that of legitimate children to require support by their fathers."

At least three United States Fifth Circuit Courts have noted the strong implications of *Levy vs. Louisiana*, supra. *Murphy vs. Houma Well Service*, 413 F.2d 509 (5th Cir., 1969), wherein the Court refused to override the presumption of legitimacy in a wedlock birth and noted that the discrimination against an illegitimate in a mother-child relationship was unalwful as expressed in *Levy vs. Louisiana*, supra. *Herbert vs. Petroleum Pine Inspectors*, 396 F.2d 237 (1968) relied upon the *Levy* decision to summarily strike down discrimination against illegitimates under the Jones Act. The Court in *Jefferson vs. Hackney*, 304 F. Supp. 1332, 1341 (N.D. Tex., 1969), noted *Levy vs. Louisiana*, supra, dealt with a basic civil right in forbidding illegitimacy discrimination in the mother-child context.

*Equal Protection Test*

It is not disputed that a state has a broad power to establish certain social classifications, but at the same time "it may not draw a line which constitutes invidious discrimination against a particular class" *Levy vs. Louisiana*, 391 U.S. 68, at page 71 (1968); *Skinner vs. State of Oklahoma*, 316 U.S. 535, 541-542 (1942). Justice Douglas noted in *Levy v. Louisiana*, supra, p. 71, that "though the test has been variously stated, the end result is whether the line drawn is a rational one. *Morey vs. Doud*, 354 U.S. 457, 465-466 (1957)."

The "rational basis" test when applied by the Supreme Court in another illegitimate case, *Labine vs. Vincent*, 401 U.S. 532 (1971), resulted in a finding that Louisiana intestate succession statute had a rational basis with respect to the state's interest in the disposition of property left within the state.

In determining whether the State of Texas' discrimination of the illegitimate with respect to child support matters has a "rational basis," it is necessary for the Court to determine both the nature of the civil right infringed, and whether there is a corresponding and overriding state interest to justify such discrimination. *Bates vs. Little Rock*, 361 U.S. 516, 524 (1960).

*Levy vs. Louisiana*, 391 U.S. 68, at 71 (1968) follows a well recognized and long established principle in this nation, that matters of life and birth and marriage and family are basic liberties requiring strong and compelling justification for any encroachment. *Skinner vs. Oklahoma*, 316 U.S. 535 (1942); *Griswold vs. Connecticut*, 381 U.S. 479 (1965); *Harper vs. Virginia Board of Elections*, 383 U.S. 663 (1966).

Having thus established that the illegitimate child is a person and subject to the benefits of the Equal Protection of the Laws Amendment to the United States Constitution, and having further established that discrimination of an illegitimate involves "basic civil rights," "the burden is on the Appellee (State) to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest." *Bates vs. Little Rock*, 361 U.S. 516, 524 (1960); *Griswold vs. Connecticut*, 381 U.S. 479 (1965) and *Kramer vs. Union Free School*, 395 U.S. 621 (1969). The Supreme Court in *Harper vs. Virginia Board of Elections*, 383 U.S. 663 (1966), has said;

"In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalog of what was at a given time deemed to be the limits of fundamental rights . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change . . . We have long been mindful that *where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or constrain them must be closely scrutinized and carefully confined.*" (emphasis added)

If, as was suggested in *Yick Wo vs. Hopkins*, 118 U.S. 356 (1886), "equal protection of the laws is a pledge of the protection of equal laws", where is the equal law for legitimate and illegitimate in the State of Texas and what can be said as to justify such classification which infringes upon basic civil rights in such a way that results, as we will see, in an economic injury and "stigmatic-catastrophe." If the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is to operate effectively it should serve as a constitutional barrier against legislative motives of hate, prejudice, hostility, etc. or alternatively, favoritism and partiality. Special benefits resulting from state legislation must be justified, either by elimination of some evil or achievement of some good. See 65 Mich. L. Rev. 477, Equal Protection for the Illegitimate, Krause (1967). It is submitted that an examination of the illegitimate in historical prospective reveals that the Texas legislation was probably motivated both by prejudice and hostility toward the illegitimate as well as favoritism and partiality of the legitimate.

"As a result of the churches' hatred of extra-marital relations, the usual legal attitude of Laissez Faire toward bastards gave way in the middle ages to a treatment of

them which deprived them of the ordinary rights of man . . . Some law books treated them as almost rightless beings, on a par with robbers and thieves . . . The medieval church, in both its concern for the family and its aversion to illicit sex, re-enforced the basic self-interest of the father."[16] Thus the law of early England, much of it evolving from the medieval church imposed a stigma upon the bastard, the impact of which has been slow to fade, and in many instances is very much alive today.

Although as early as Blackstone's time, I Blackstone, Commentaries 454-60, the illegitimate had a right of support from his father, Texas remains as " . . . one of three states in the United States that has no form of statute requiring a father to support his illegitimate children; in point of fact, we are one of the few jurisdictions in the Western World with no such statute." 33 Tex. Bar J. 958, Eugene Smith (Dec., 1970).

What then is the substantial and compelling reason for such infringements of the illegitimate's basic civil rights? I submit that any rational for such discrimination in Texas fails the legitimate and rational purpose test as described, and further fails the test of equal protection in that it does not operate upon all members of the larger class equally. See *Skinner vs. Oklahoma*, 316 U.S. 535, 541 (1942) wherein the Court struck down Oklahoma's compulsory sterilization of habitual criminals as unequal protection because some crimes were excluded from the act.

In applying the Equal Protection Test to the facts in this case the Court should not only consider any need and rational for the discrimination against the illegitimate but should weigh this against the deprivation and results

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[16]Hooper, Illegitimacy, (1911), p. 27

from deprivation of the illegitimate's basic civil rights. What then are the circumstances directly attributable to the state's denial of support to the illegitimate and the state enforced stigma of illegitimacy flowing therefrom?

### *Socio-Economic Consequences of Illegitimacy Discrimination*

While the illegitimate or bastard obviously is discriminated against with respect to support rights from his father, the full extent of the bastard-stigma enforced by this and other such state laws and customs shocks one's conscious. His status is little different today from what Davis described in 45 Am. J. Sociology 215 (1939);

> "The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undeniable evidence of contramoral forces; in short, a problem—"

The impact of the bastard-stigma is further noted in that to create a bastard is not yet an *actionable* tort, *Zepeda vs. Zepeda*, 190 N.E.2d 849 (1963), but to wrongfully call another a bastard is a defamatory epithet classed as a tort along with "immoral or unchaste, or queer . . . a coward, a drunkard, a hypocrite, a liar, a scoundrel, a crook, a scoundrel-mongrel, an anarchist, a skunk, a bastard, an eunuch—because all these things obviously tend to affect the esteem in which he is held by his neighbors." Prosser on Torts, 757-58 (3rd ed. 1964).

Under the present makeup of our society the illegitimate's reactions to life are bound to be completely abnormal. As one psychologist stated "to be fatherless is

hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe."[17]

Not only is the illegitimate totally deprived of a father-figure but as a study of illegitimates indicated, 52% of them had changed their mother-figure more than once since birth.[18] One presumes this to be the result of grandparents, sisters, aunts and foster mothers assuming much of the duties of caring for the children of young illegitimate mothers.

The emotional trauma experienced by an illegitimate child totally deprived of a father-figure and more than half the time deprived of a mother-figure is exemplified in a study of A.F.D.C. legitimate and illegitimate children's school, personal, and social adjustment.[19] The author of this persuasive study concluded:

> "Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences . . .
>
> The second disconcernible pattern was that the older group of illegitimate children consistently made a poorer showing than the younger group, in comparison with the legitimate children. A possible explanation of this is that, as these children grew older and are able to interalize fully the concept of illegitimacy and as they become increasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory." p. 173.

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[17] Fodor, "Emotional Trauma Resulting From Illegitimate Birth" 54 *Archives of Neurology in Psychiatry*, (1945), p. 381

[18] Young, *Out of Wedlock*, (1954), pp. 237-238

[19] Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School, Personal, and Social Adjustment of Negro Children, 64 *Am. J. Sociology*, (1958) p. 169

The illegitimate, provided he escapes his higher infant mortality rate, consistently shows a substantially higher rate than legitimate children in the areas of the incidences of juvenile delinquency, and neuroticism. He is significantly stigmatized by the nature of his birth.[20]

Comparable damaging psychological effects of discrimination was one of the motivating factors in the Court's striking down racial discrimination in *Brown vs. Board of Education*, 347 U.S. 483, 494 (1954).

An analysis of the children most affected by illegitimacy discrimination reveals that the socio-economic group least able to abandon the right of support from the child's father is the same group upon whom the consequences of illegitimacy most often fall. "There are very similar levels of difference in incidence of illegitimacy when one compares social classes, but it is easier to trace and analyze the difference by color."[21] In any event the group is ultimately revealed in the ensuing statistics. For example, 37.5% of women in families earning under $3,000.00 per year were pregnant at the time of their marriage in 1970, while only 8.5% of women in families earning $10,000.00 or more a year were pregnant at the time of their marriage.[22] Thus revealing the incidence of pregnancy outside of marriage for low income women exceeding that for middle to higher income women by more than four times. Middle income whites have a three

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[20] Podolsky, "Emotional Problem of the Illegitimate Child," 70 *Archives of Pediatrics*, (1953) p. 402 and Gillen, *Social Pathology*, 3rd Ed., (1946) p. 298, (that he is more likely to be neurotic, p. 311)

[21] Ryan, *Blaming the Victim*, (1971) p. 93

[22] U.S. Department of Health, Education & Welfare, U.S. Gov., National Center for Health Statistics, (1970)

times higher rate of post-pregnancy marriages than blacks.[23]

Because of abortion and adoption patterns in this country the black-white illegitimacy differentials are further expanded. The white illegitimate mother and child have substantially greater expectations of being assimilated into a stable social pattern than does the non-white illegitimate. For example, some 70% of all illegitimate white babies are adopted, while only 4% of non-white illegitimates can anticipate that good fortune.[24] Applying these adoption rates to the 3,428 illegitimate children born in Dallas in 1969,[25] and excluding the insignificant number of Mexican-Americans, the net results is that of the 2,229 black illegitimates born last year in Dallas after 4% or 89 of them are adopted, 2,140 still remain. Of the 1,059 white illegitimates born last year, after 70% of 741 of them are

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[23]Ryan, *Blaming the Victim*, (1971) p. 93; P. Garland, "Teenage Illegitimacy in Urban Ghettos," *Unmarried Parenthood*, (1967)

[24]U.S. Department of Health, Education & Welfare, Vital Statistics, *Illegitimacy's Impact on Aid for Dependent Children Program*, (1960), pp. 35-36.

Illegitimacy discrimination is even more repugnant when viewed in the light of these adoption practices. As was noted in *Blaming the Victim*, Ryan, 1971, at 111;

"Of course, as I have hinted, illegitimacy is functionally useful to society. To eliminate it would be to eliminate the raw material of the adoption process, whose products are sought after by childless middle class couples. The great surplus of unadopted illegitimate children is, by these standards, an untidy by-product of the process, substandard material that is to be thrown back onto the resources of the hopelessly inadequate child welfare and public assistance system."

[25]Texas, City of Dallas, Department of Vital Statistics

adopted only 318 will remain. Thus the ultimate illegitimate addition to the City of Dallas for 1969 was 87% black and 13% white.

The above statistics are based upon live illegitimate births and do not take into consideration the fact that the white pregnant girl has substantially more alternatives available to her than the non-white. For example, the incidence of abortions for illegitimate pregnancies in one study ranged from 83% for white college educated women, down to 25% for non-white high school educated women.[26] Because of financial, housing and social problems the non-white pregnant girl often finds unavailable either abortion, post-pregnancy marriage or adoption as alternatives to illegitimacy.[27]

A summary of the probable facts surrounding the illegitimate child in Dallas, Texas would thus reveal that he is 87% of the time black, most often in the lower income levels, that he comprises by far the largest segment of the children receiving Aid for Dependent Children, (28.5%)[28], that his life is or will become a "psychological catastrophe", that he will more often than his legitimate brother, be confronted with the problem of juvenile delinquency and neuroticism, that he will have lower grades in school but higher absences, that as he grows older he will become increasingly aware of his socially inferior status and his adjustment to self and

[26]Ryan, *Blaming the Victim*, (1971), p. 93. See also Erhardt, Tietze & Nelson, *Therapeutic Abortions in New York City*, (1965-1967)

[27]P. Garland, "Teenage Illegitimacy in Urban Ghettos," *Unmarried Parenthood*, (1967)

[28]Department of Public Welfare Commissioner Hackney's Testimony before Texas Senate Interim Committee on Welfare Reform, July 9, 1970

society will become progressively less satisfactory. He will receive no financial support from his father. Aside from the absence of a father-figure, which it is conceded many legitimate children do not have, he will also have a high incidence of transfer of the mother-figure. He may, as his parents did, give birth to an illegitimate.[29]

Formerly illegitimates were denied public office, suffered reduced penalties for their murder, could not be a witness in Court, had no burial rights, and escheated their bodies to medical science upon their death.[30] If this shocking treatment of the illegitimate which occurred three and four hundred years ago offends us today, how can this state justify the deprivation of the illegitimate's liberties so as to cause or even contribute to cause the plight in which we find him?

The State of Texas doesn't merely passively permit the bastard-stigma, it actively fosters and perpetuates a prejudice that is repugnate to this nation's concepts of justice.

> "Mr. Justice Jackson once spoke of the 'treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case' *Jordan vs. DeGeorge*, 341 U.S. 223, 242 (dissenting opinion). The difficulty and dangers are compounded when religion adds another layer of prejudice. The end result is that juries condemn what they personally disapprove." *United States vs. Vuitch*, 402 U.S. 62, at 79 (1971) (J. Douglas' dissent).

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[29]Barrett, *The Case of the Unwed Mother*, (1964). 49 Iowa L. Rev. 1005, at 1006

[30]Buckling, *Die Rechtsetellung Der Unehlichen Kinder Im Mittelalter Und In Der Heutigen Reformbewegung*, (1920)

Justice Douglas' dissent in *United States vs. Vuitch*, supra, at nl, page 78-79, although discussing the abortion issue, speaks directly to the problem of the bastard-stigma, when he set forth the psychiatric view;

> "Although the moral issue hangs like a threatening cloud over any open discussion of abortion, the moral issues are not all one-sided. The psychoanalyst Erik Erikson stated the other side well when he suggested that 'The most deadly of all possible sins is the mutilation of a child's spirit.' There can be nothing more destructive to a child's spirit than being unwanted, and there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood."[31]

This state cannot justify separate schools for legitimates and illigitimates, it cannot justify a different wage rate for legitimates and illegitimates, it cannot justify different voting rights or different taxing principles or different military service obligations to legitimates and illegitimates. How then can it justify under the color of law its contribution to the above outlined socio-economic burdens of the illegitimate, be they purely economic or indirectly stigmatic?

Without attempting to anticipate the state's justification for illegitimacy discrimination in matters of the father's support obligation, which burden is strictly the state's, it should be pointed out that an enforced lack of support rights for illegitimates would certainly make it more difficult for the mother to establish a normal family relationship through subsequent remarriage. "Indeed, the law's failure to impose a substantial economic burden on the illegitimate's father may be more likely to encourage

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[31] *The Right to Abortion*: A Psychiatric View 218-219 (Group for the Advancement of Psychiatry, Vol. 7, Pub. No. 75, 1969)

illegitimacy than marriage." 36 Chic. L. Rev. 338 at 349, Equal Protection and Paternity, Krause, (1969).

The Supreme Court in *Smith vs. King* 392 U.S. 309 (1968), at least impliedly stated that Alabama's desire to promote morality and legitimacy by disqualifying certain illegitimate children from its welfare program did not have a sound or legitimate basis. The very concept of punishing the child in an effort to discourage promiscuity has no rational basis in fact nor can it be supported under Federal Constitutional Law. Such "punishing" is discussed at length in the section of this brief addressed to the child's rights under the Ninth Amendment.

The certainty or uncertainty of paternity should not be a factor in the Court's consideration of the issues before it in this case. These are matters of evidence and proof whereas the issue before this Court is concerned with determining whether the child and mother should have a right to initiate such a question in the State of Texas. Suffice it to say that an illegitimate's paternity can be medically established with a far greater degree of certainty than is shown by the presumption of legitimacy in the child born in lawful wedlock. At least one recent German case authoritatively considered a detailed blood test to establish a 99.55% probability of paternity.[32] "It is the function of Courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform." *Samms vs. Eccles*, 358 P.2d 344, 347 (Utah, 1961).

The position assumed by the State of Texas to discriminate against the illegitimate in matters of support

[32] L.G. Koeln, 13.10.1961, 16 *Monatsschriftfuer Deutsches Recht*, (1962), p. 309

from his father is not based upon any overriding public interest. Furthermore, if the state has any overriding interest in controlling illegitimacy the denial to the illegitimate child of his rights to support from his father is a grossly over inconclusive classification of the parties against whom that legislation should be directed. Thus we are brought to the second part of the Equal Protection Test as expressed in *Shelton vs. Tucker*, 364 U.S. 479 at 488 (1960).

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Thus no persuasive reason appears to justify either the purpose or breath of illegitimacy discrimination in child support matters. This fact is made abundantly clear when it is considered that the illegitimate child, except for the matter of name and support, is in a situation very comparable to that of a child of divorced parents, which child has full rights of support.

After searching for a rational purpose to illegitimacy discrimination one well known writer in this area concluded there was no rational purpose and stated "our long continued acceptance of the legislatively enforced inequity between legitimate and illegitimate children may rest on much the same ground as the inferior position of women, Negroes and the classes through the centuries . . . prejudice." 65 Mich. L. Rev. 477, at 498 *Protection for the Illegitimate*, Krause (1967).

## III.

## Texas' Refusal To Permit an Illegitimate Child To Initiate an Action Against Her Father for Support, Denies Her Due Process of Law Under the Fourteenth Amendment to the United States Constitution.

"... nor shall any state deprive any person of life, liberty, or property without due process of law; ..." AMENDMENT FOURTEEN, Section 1, United States Constitution.

The State of Texas by statutory enactment and judicial decision has created an insurmountable barrier to any action by an illegitimate child to obtain support from its father. Just as in the preceding Equal Protection Test, unless the state can establish a rational basis for distinguishing the illegitimate from the legitimate, and present compelling reasons to justify such discrimination, then the illegitimate seeking a father's support has not been granted due process of law in Texas as guaranteed by the United States Constitution.

Due Process except where justified or excused by some reasonable classification, requires equal application of the law. *Shapiro vs. Thompson*, 394 U.S. 618 (1969). Such application manifestly is not present in this instance.

Inasmuch as there is no equal application of the law between the legitimate and the illegitimate in the State of Texas with respect to support from their fathers, then we are confronted with the deprivation of the same basic civil rights discussed under the preceding Equal Protection Clause, the same burden upon the State of Texas

to justify such discrimination, and the same appalling socio-economic conditions which are at least aggravated if not caused by the invidious discrimination practiced by the state against illegitimates.

Where the State of Texas has recognized a right of the legitimate child to receive property from his father in the form of aid and support, and has further permitted that child to call upon the Courts of this state to enforce that right, and has attached a criminal penalty against the parent for violating such right, Article 602 of the Texas Penal Code, and Article 4.02 of the Texas Family Code, the state cannot now contend that the deprivation of a father's support from an illegitimate child is not the deprivation of a property right.

The definition of property as protected by Due Process Law under the Fourteenth Amendment of the United States Constitution has never been strictly construed. The clause "property" as used in this Amendment means not only the mere thing which a person owns but it includes the right to acquire, use, and dispose of it, all of which essential attributes of property are protected by the Constitution. *Buchanan v. Wareley*, 245 U.S. 60 (1917). Thus the protection of the Due Process Clause is not restricted to "property" in the conventional sense. *Smalls vs. Ives*, 296 F. Supp. 448 (D.C. Conn., 1968).

The illegitimate's right to her child support, the same as any legitimate child, is thus a property right protected by the Due Process Clause of the Fourteenth Amendment. As to property rights in causes of actions see *Martinez vs. Fox Valley Bus Lines*, 17 F. Supp. 576 (D.C. Ill., 1936).

The United States Supreme Court denied certiorari, 390 U.S. 1028, in a New York case which broadly defined

"liberty" used in this constitutional context as not only the right of the citizen to be free from mere physical restraint of his person, such as by incarceration, but also embraced the right of a citizen to be free in the enjoyment of all of his facilities, to be free to use them in all ways, to live and work where he will, to earn his livelihood or avocation. *Madera vs. Board of Education of City of New York*, 386 F.2d 788 (2nd Cir., 1967).

While the Appellant contends that the failure of the State of Texas to afford adequate support remedies to an illegitimate child is a fundamental cause of the socio-economic calamity in which that child finds himself as described above, it is submitted that even if the state is only one of many contributing causes, then this state is depriving illegitimate children of their fundamental liberties and such action flies in the face of the Due Process privileges as guaranteed by the United States Constitution.

It is submitted, therefore, that the classification by the State of Texas as to legitimates and illegitimates for determining their rights of support from their natural father deprives children of unwed parents of their "liberty" as well as their property in dollars and "property in rights". James Madison underscored the need of the government to protect its citizen's "property in rights" to the same extent it would guard one's "rights of property".[33]

Where an illegitimate child is, without rational basis, deprived of his liberties or property as a result of acts of parties committed contemporaneous with his conception but long prior to his birth, it would necessarily be

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[33]James Madison, *The Right to Property and Property in Rights*, Madison Letter IV, "Property," 3 Annals of America 497

concluded that he is totally and completely deprived of due process of law.

If the state cannot justify the levying of a special tax on illegitimates, (a gross constitutional violation, then how can it justify bestowing special economic privileges upon the legitimate?

## IV.

### The Illegitimate's Right to Support from Her Natural Father Is a Fundamental Right and Liberty the Deprivation of Which Violates the Protections of the Ninth Amendment of the U.S. Constitution.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." AMENDMENT NINE, United States Constitution.

The United States Supreme Court has not exhibited any hesitancy to hold the right of the individual to enjoy a family relationship as a basic fundamental civil right. *Skinner vs. Oklahoma*, 316 U.S. 535 (1942); *Griswold vs. Connecticut*, 381 U.S. 479 (1965); and *Loving vs. Virginia*, 388 U.S. 1 (1967).

"It would seem to be beyond question that the child's right to a familial relationship with his father is more akin to a "fundamental right and liberty" or a basic civil right of man than to a mere economic interest".[34] The initial District Court in this case had previously recognized the problem of illegitimate discrimination as "a basic civil

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[34] 65 Mich. L. Rev. 477 at 488, *Equal Protection for the Illegitimate*, Krause, (1967)

right". *Jefferson vs. Hackney*, 304 F. Supp. 1332, 1341 (1969).

Given then the fact that interference in the family relationship constitutes a deprivation of a basic civil right and given the additional fact as presented in the Equal Protection portion of this brief, that there is no rational basis for such severe interference with the family relationship it would seem to follow on its face that the act of the State of Texas in providing relief to legitimate children but denying it to illegitimates is an unconstitutional deprivation of basic civil rights under the Ninth Amendment of the United States Constitution.

Although Appellant does not contend that this Court should grant the relief prayed for because of violations in and for themselves of the Eighth Amendment and Third Article of the United States Constitution, it is submitted, that both of these constitutional guarantees deal with basic civil rights and as such are similarly protected under the provisions of the Ninth Amendment upon which Plaintiff does rely.

Article III of the United States Constitution provides:

> "The Congress shall have Power to declare the Punishment of Treason, but no attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained."

It is often contended that by eliminating the right of the illegitimate child to receive support from his father the state will discourage promiscuity and illicit sex. Irrespective of the effectiveness of such intent or even of its legality of purpose, one cannot rationalize any basis whereby we may properly punish the child in order to invoke guilt feelings in the mother or father to whom we are directing the sanctions of the law.

Justice Douglas noted this concept in his concurring opinion in *Smith vs. King*, 392 U.S. 309, 336 n. 5 (1968), wherein he stated;

> "This penalizing the children for the sins of their mother is reminiscent of the archaic corruption of the blood, a form of a bill of attainder, . . ."

While the problems of the illegitimate are serious and growing more so daily in our society, they nonetheless represent a symptom and not the cause. Blaming the illegitimate himself will serve only to further stigmatize the nature of his birth as a bastard and contribute to the problem and not the solution.[35]

One cannot see how a citizen in this state or country can be punished as an innocent "non-party" for someone else's undesirable conduct. Despite that fact, the state's refusal to permit the illegitimate to enjoy the same fruits of support as the legitimate child carries into full effect that very irrational concept.

One could ask as Justice Douglas did in *Levy vs. Louisiana*, 391 U.S. 68, 72 (1968);

> "Why bastard, wherefore base? When my dimensions are as well compact, my mind as generous, and my shape as true, as honest Madam's issue? Why brand they us with base? With baseness? Bastard? Base, base?" W. Shakespeare, *King Lear*, Act I, Scene 2.

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[35]Ryan, *Blaming the Victim*, p. 110. Where Ryan, a former Harvard and Yale Medical Schools psychologist and sociologist said: "The 'problem' of illegitimacy is not due to promiscuity, immorality, or culturally-based variations in sexual habits; it is due to discrimination and gross inequities between the rich and poor, and more particularly, between white and black. It is the visible sign and outcome of a total pattern of inequality in the distribution of, and access to significant resources. . ."

Not only does the state's irrational classification of the illegitimate punish an innocent "non-party" for someone else's conduct, but as such the punishment inflicted would seem to be of a cruel and unusual nature. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted," EIGHTH AMENDMENT, United States Constitution (emphasis added).

The United States Supreme Court in *Trop vs. Dulles*, 356 U.S. 86, 100-101 (1958) outlined the constitutional theory of cruel and unusual punishment.

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . the words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the progress of a maturing society."

The Court shortly thereafter found that a condition innocently or involuntarily entered into and for which the individual was punished was invalid and was "cruel and unusual" under the Eighth and Fourteenth Amendments. *Robinson vs. California*, 370 U.S. 660 (1962).

One writer after reviewing *Robinson vs. California*, supra, and other related opinions concluded "even the narrowest of these interpretations (supports) the notion that *punishing a status involuntarily entered into and which cannot voluntarily be abandoned is unconstitutional*."[36] (emphasis added.)

Despite the fact that the illegitimate child can neither control the fact of his being nor alter the conditions of

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[36] Amsterdam, *Federal Constitutional Restrictions on Punishment*, 3 Crim. L. Bull. 205 (1967)

his illegitimacy, the State of Texas continues to deprive him of the same rights they afford to other legitimate children.

It is well established that a third party is not responsible for acts of persons beyond its control, *N.A.A.C.P. vs. Overstreet*, 384 U.S. 118 (1966); and that ancestral distinctions are "by their very nature odious to a free people". *Oyama vs. California*, 332 U.S. 633, 646 (1948). In that case the Court refused to inflict harm on a child because of the status of his alien father.

The Supreme Court of this nation has already noted in *Skinner vs. Oklahoma*, 316 U.S. 535 (1942), that to permit a state to curtail the existence of a particular class of individuals by the use of enforced sterilization, was a dangerous intrusion into the basic civil rights of man. A compelling argument can be made for the wrong in permitting the procreation of an infant and to then enforce unusual and extremely detrimental circumstances upon his life because of the behavior of his ancestors.

As was pointed out in the Petitioner's brief in *Levy v. Louisiana*, 369 U.S. 68 (1968), if corruption of the blood is explicitly forbidden by the constitution with respect to the heinous crime of treason, it certainly should not be permitted in a lesser context. "The son shall not bear the inequity of the father". Ezekiel 18:20

Thus the discriminatory classification of the illegitimate by the State of Texas may well work a violation of Article III of the United States Constitution prohibiting a corruption of the blood and of Amendment Eight of the United States Constitution forbidding Cruel and Unusual Punishment, but in any event such action by the State of Texas deprives the illegitimate child in this case of his basic and fundamental civil liberties and does so without

any rational overriding state concern and is, therefore, a clear and undisputed breach of the child's rights under the Ninth Amendment of the United States Constitution.

## V.

### Texas' Invidious Discrimination Against an Illegitimate Child in Support Matters Operates to Deny that Child's Mother Her Fundamental Liberty Under the Provisions of the Ninth Amendment of the United States Constitution.

The adverse circumstance in which the illegitimate finds himself in Texas is certainly compounded and aggravated by the refusal of the state to permit that illegitimate child to collect support from its father. It would not be wrong to assume that a pregnant unwed woman is fully aware of the stigmas that will attach to her illegitimate child as well as the extreme financial and social hardship that will be brought to bear upon the child. The State of Texas, through its discriminatory application of the child support provisions, enforces and accentuates the already harsh economic world for the mother of the illegitimate child.

The Garland study concluded that non-whites beset by financial, housing and social problems often have unavailable to them the alternatives to rearing an illegitimate child which are available to a pregnant white woman.

The apparent alternatives to rearing an illegitimate child aside from post-pregnancy marriage, are abortion or abandonment either in the form of legal adoption or giving the child to other parties to rear. The Court will recall the previous statistics that some 70% of white

children, but only 3% of blacks are adopted and the additional differential of 83% white college women abortions compared to 25% black high school educated.[37] Whether it is the social stigma or the economic capacity among the whites that result in significantly more adoptions and abortions, the point remains that at least one group of unmarried pregnant women is turning to abortions and adoptions to solve their problem of illegitimacy.

While it is undisputed that the State of Texas enforces a withholding of economic support from the father of the illegitimate child, it should also be seen that this action by the state is one of the primary sources of the stigma of bastard which afflicts the illegitimate.

It is reasonable to assume that a significant portion of unmarried pregnant women would not turn to abortion or adoption were it not for the stigma of the bastard concept and the economic hardship which they foresee. The State of Texas has thus brought to bear upon the mother of the illegitimate child a form of economic and social coercion which is not insignificant in promoting abortions and abandonment by the mother of that child. The circumstances would be little different if the state, as a population control, excluded all babies born in September from support rights, and next year extended the exclusion to all children of Protestant parents. In either event economic coercion is forced on the mother.

Thus we reach an infringement of the mother's basic fundamental liberties as guaranteed by the Ninth Amendment of the United States Constitution. The Supreme Court of this nation has long ago held that the procreation of children is fundamental to the very

[37] Ryan, *Blaming the Victim*, p. 96

existence and survival of the race, *Skinner vs. Oklahoma*, 316 U.S. 535, 541 (1942). Is there any liberty more fundamental or freedom more basic than the right of a mother to *freely* elect to have and keep her child?

> "Unless the state has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day to day living habits." *Griswold vs. Connecticut*, 381 U.S. 479, 492 (1965).

A woman's liberty and right of privacy extends to family, marriage and sex. *Loving vs. Virginia*, 388 U.S. 1 (1967).

A right by the mother to *freely* elect to have and keep her own child must indeed be within the area of the Ninth Amendment guarantee which the United States Supreme Court in *Powell vs. Alabama*, 287 U.S. 45, 67 (1932) described as a right;

> "... of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions..."

Appellant submits to the Court that it is amply understood that the enforced withholding of economic support to the illegitimate child creates a type of economic coercion as well as perpetuates the social stigma of the bastard, which coercion and stigma frequently compel the mother to elect the alternatives of abortion or adoption. In either event the mother, though she may desire otherwise, but motivated by a concern for her child's best welfare, is forced to abandon one of the most fundamental privileges and freedoms of this nation, that is the right to *freely* choose whether to have and keep a child. *Any action* by the State of Texas to enforce such coercion upon the mother of the illegitimate bears

the closest of scrutiny and should reveal a very large overriding public concern and rational for such state action.

Warner, in the *Unmarried Mother in German Literature*[38] described the beginning of illegitimate infanticide as having its roots in the condemnation by the church of the mother's pregnancy, and resulted from the mother's attempts to conform with the church's requirements by secretly killing her illegitimate child.

One today can see but a slight sophistication, wherein the state, instead of the medieval church, brings to bear upon the unwed mother a form of economic coercion which effectively induces abortions of unborn illegitimates, and abandonment by adoption.

## VI.

### Texas' Denial to this Illegitimate Child a Right of Support from Her Father, Constitutes a Violation of the Mother's Due Process and Equal Protection Guarantees of the Fourteenth Amendment to the United States Constitution.

The theory, concept and test of the Equal Protection Clause and Due Process of Law Clause of the Fourteenth Amendment to the United States Constitution has

[38] Warner, *Unmarried Mother in German Literature*, p. 24 and p. 27, (1917)

"The unusual punishments for infanticide during the middle ages and even into the 18th Century were: sacking . . . an infant being sewed up in a sack and thrown into the water; burying alive . . . ; impaling . . . a pointed stick being driven into the heart; and burning alive . . . these cruel forms of punishment by the Civil Courts . . . were paralled by the most humiliating public church penance for the unmarried mother who did not kill her child."

already been outlined above. The Supreme Court has permitted an illegitimate's mother to recover for that child's wrongful death, holding that:

> "When the claimant is plainly the mother, the state denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." *Glona vs. American Guaranty & Liberty Ins. Co.*, 391 U.S. 73, 76 (1968).

If, as the U.S. Supreme Court has declared in *Loving vs. Commonwealth*, 388 U.S. 1 (1967), the right to marry is protected by the Fourteenth Amendment Due Process Clause, because such right is vital to the personal right essential to the orderly pursuit of happiness, then certainly that same immunity should apply to the right to freely elect to bear and keep one's own child without *any* degree of coercion to the contrary by the state.

It has already been seen that the State of Texas exerts economic coercion upon the mother which can tend to compel her to abort or abandon her illegitimate child. Such pressure in any form violates not only the Ninth but the Fourteenth Amendment rights of the mother.

A state should be slow to condemn a mother's wrongdoing in giving birth to an illegitimate child when that same state permits to go stark free and totally without economic restraint the father who certainly was an equal participant. Benjamin Franklin may have perceptively defined that problem when he had the fictitious and unmarried Polly Baker complain[39] that her seducer and betrayer and the cause of her misfortunes had gone

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[39] Smith, *The Writings of Benjamin Franklin*, Vol. 2, pp. 463-467, (1747)

on to honor and power while she was left pleading before the Court. She asked;

"... but how can it be believed that heaven is angry at my having children, when to the little done by me toward it God has been pleased to add his divine skill and admirable workmanship in the formation of their bodies and crowned it by furnishing them with rational and immortal souls?"

If it be determined that the mother in this instance was wrong in not complying with the form of the family relations deemed proper by the state, is it such a wrong as to justify an economic coercion and social stigma that deprives her rights of Due Process and Equal Protection of the laws. Appellant submits that it is not.

## CONCLUSION

Neither the Texas common law nor statutory enactments permit the illegitimate child to enforce support from her father although these privileges are afforded legitimate children in this state. Appellants submit to the Court that such illegitimacy discrimination is a violation of the child's Equal Protection and Due Process of Law guarantees under the Fourteenth Amendment to the United States Constitution and furthermore is a deprivation of their basic and fundamental civil rights in violation of the Ninth Amendment to the United States Constitution.

The discriminatory exclusion of the illegitimate child's support rights from her father works a significant economic coercion on the mother which results in depriving her of her own fundamental liberties under the Ninth Amendment and of the Equal Protection of the Laws and of Due Process of Law under the Fourteenth Amendment to the United States Constitution.

The magnitude of the problem of illegitimacy in sheer numbers and perhaps more significantly in resulting socio-economic consequence, to each child of an unwed parent, results in an injury to child and mother within the "zone of interest" of Article 602, and thus Appellants have standing to sue.

If the law of this state as sanctioned by the United States Constitution and the Courts does not express a duty on the part of the illegitimate's father to care for his child then society should not expect that father to voluntarily recognize and assume such duty. Equally important perhaps with the economic factors involved in this case is the recognition that even an unwilling father forced to assume his responsibilities to his child would help to remove the social stigma of illegitimacy which so afflicts the innocent youngster.

The illegitimate, absent his own participation, has been categorized without rational basis, stripped of his dignity without due process, and relegated to a socio-economic catastrophe closely akin to cruel and unusual punishment; this because of a centuries old myth that this blood is corrupt. While the concept may have originated in the church and has been perpetuated by prejudice of the people, it has, in any event, enjoyed the endorsement of the state. Until this inequity and injustice is rectified by an application of constitutional restraint it can scarcely be hoped that the illegitimate will enjoy "the promise of America."

> "To every man his chance, to every man regardless of his birth, his shining opportunity . . . to every man, the right to live, to work, to be himself and to become whatever thing his manhood and his wisdom can combine to make him—this . . . is the promise of America." *Thomas Wolfe*

## PRAYER

WHEREFORE, Appellants pray that the decision of the Three Judge District Court be reversed, that a permanent mandatory injunction issue, requiring the Dallas County District Attorney and the State of Texas to cease discriminatorily excluding children of unwed parents from the benefits of its child support laws, and specifically from excluding children of unwed parents from the benefits of Article 602 of the Texas Penal Code.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief is mailed this____ day of June, 1972, return receipt requested, certified mail, to Mr. Pat Bailey, Assistant Attorney General, Capitol Station, Austin, Texas, Attorney for the State of Texas, and to Mr. John Tolle, Assistant District Attorney, Dallas County Government Center, Attorney for Henry Wade, Dallas County District Attorney, Dallas, Texas 75202.

Windle Turley
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Clerk of the Court